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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DARA WAYNE ALLEN, Defendant and Appellant.	B216151 (Los Angeles County Super. Ct. No. BA310449, Consolidated with BA344930)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis Landin, Judge. Modified in part; affirmed in part.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Dara Allen was convicted, following a jury trial, of one count of assault on a peace officer in violation of Penal Code[1] section 245, subdivision (d)(1), and one count of custodial possession of a prisoner-made weapon in violation of section 4502, subdivision (a). The jury found true the allegation that appellant used a firearm in the commission of the assault within the meaning of section 12022.53, subdivision (b) and 12022.5, subdivisions (a) and (b). The trial court sentenced appellant to a total term of 33 years in state prison.

Appellant appeals from the judgment of conviction, contending there is insufficient evidence to support his conviction for violating section 4502. Appellant further contends the trial court erred in consolidating the two cases against him, failing to instruct the jury on a peace officer's lawful performance of his duties, and permitting evidence of his post-accident combativeness. Appellant also contends that one of his prior prison allegations must be stricken. We agree that the prison term must be stricken. We affirm the judgment of conviction in all other respects.

Facts

On October 4, 2006, Detective Michael Estrada went to the scene of a reported shooting and interviewed the victim. She showed him a backpack with a tear in it. Inside the backpack was a bullet fragment.

Los Angeles Police Officers Robert Quiroz and Sean Kinchla were on patrol in their marked car when they heard a radio broadcast concerning a shooting near their location. Officer Quiroz soon saw appellant, who matched the broadcast description of the suspect in the shooting. Appellant was carrying a black jacket over his right arm.

Officer Quiroz pulled the patrol car up to appellant and stopped. Appellant looked at the officers and immediately began running. The jacket fell from appellant's arm as he ran. Officer Quiroz saw that appellant was holding a handgun. Officer Quiroz chased appellant, who then began to turn toward the officer. Appellant's arm was partially

[1] All further statutory references are to the Penal Code unless otherwise indicated.

extended out, about shoulder height and the gun was pointing in Officer Quiroz's direction.

Officer Quiroz began to raise his own gun toward appellant. Officer Kinchla shot appellant.

Appellant dropped the gun when he was shot. The gun was recovered, tested and determined to be the gun which fired the bullet involved in the shooting incident investigated by Detective Estrada.

Appellant was charged with attempted murder and assault on a police officer with a firearm. He was acquitted of the attempted murder charge. The jury hung on the assault charge.

On July 23, 2008, Deputy Sheriff Gerardo Servin was the bailiff in Department 124 of the Foltz criminal courthouse. Appellant did not follow the deputy's commands when the deputy escorted him to the courthouse lock up. In the lock up, he was taken to a cell and told to face the wall. Appellant said to Deputy Servin, "I'll be ready for you guys tomorrow." Appellant then said that he meant he would be ready for his trial.

On July 24, 2008, appellant was taken by bus from the county jail to the courthouse for his appearance in Department 124. Once he arrived at the courthouse, he was taken to a separate cell on a floor near the courtroom to be held until he could be searched by deputies. All inmates are searched before being taken to their courtroom. Deputy Sheriff Daryll Harkless, a bailiff, was assisting in searching prisoners that day. He searched appellant and discovered a prisoner manufactured weapon, known as a "shank," inside an ankle brace appellant was wearing.

Appellant was charged with making criminal threats and possessing a prisoner made weapon in connection with the courthouse incident. These charges were consolidated for trial with the assault charge from the 2006 incident.

Discussion

1. Section 4502

Appellant contends that there is insufficient evidence to support his conviction for custodial possession of a weapon. He contends that possession of a weapon in a courthouse is not covered by section 4502, and that sheriff's deputies working at the courthouse are not officials, officers or employees of a penal institution.

Section 4502 provides in pertinent part: "Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control . . . any dirk or dagger or sharp instrument . . . is guilty of a felony." The term "penal institution" includes county jail. (§ 4502, subd. (c).)

"[T]he sheriff shall take charge of and be the sole and exclusive authority to keep the county jail and the prisoners in it." (Gov. Code, § 26605.)

Here, appellant was an inmate of the Twin Towers county jail. He was transferred from that facility to the Foltz courthouse and placed in a lock up at the courthouse which is run by sheriff's deputies. It was in that lock up that appellant was searched by a sheriff's deputy before being sent to the appropriate courtroom.

The lock up qualifies as a part of the county jail system for purposes of section 4502. The purpose of the lock up is to detain jail inmates when they are not in a courtroom. Inmates are taken to and from the lock up jail by Sheriff's deputies and other employees of the Sheriff, such as bus drivers. The lock up is run by Sheriff's deputies who are assigned full-time to lock up duties. Sheriff's deputies serving as courtroom bailiffs go to the lock up each morning to assist with searches, but they do not do so on behalf of their specific courtroom. Deputy Harkless, for example, was the bailiff for Department 129 and he searched appellant, who was headed to Department 124 for trial. (See § 4000, subd. (2) [common jail is jail maintained by sheriff of county for, inter alia, "the detention of persons charged with crime and committed for trial"]; *People* v. *Carter* (1981) 117 Cal.App.3d 546, 549-550 [holding cells at sheriff's station qualify as a jail for

purposes of § 4574]; see also *People* v. *Best* (1959) 172 Cal.App.2d 692, 695 ["jail" is place of confinement of persons held in lawful custody].) Appellant was in the lock up when the shank was discovered.

The Sheriff's deputies running the lock up qualify as penal officials, officers or employees. The Sheriff is in charge of prisoners in the county jail, and there can be no doubt that he is an official of that institution. He carries out this responsibility through his deputies and other employees. Clearly, inmates do not remain confined in a county jail at all times. They all must attend court, and some may go to other locations, such as work programs or outside hospitals. Their movements are controlled by sheriff's deputies. Since virtually all inmates will be required to attend court at some point, the sheriff has assigned deputies at courthouses to maintain custody of the inmates. They are acting as officers or employees of the sheriff and the county jail.

Even assuming for the sake of argument that the Sheriff's deputies are not penal institution officers or employees and the lock up was not part of the county jail system, appellant would still be covered by the conveyance portion of section 4502. Appellant acknowledges that he was being conveyed from county jail, but contends that once he got off the bus, he was no longer in the custody of penal officers or employees and the conveyance ended. We do not agree.

Appellant was being conveyed from the jail to a specific courtroom within the courthouse. Appearing in that courtroom was the sole purpose for his conveyance. He had not yet reached the courtroom when the shank was discovered. Thus, he fell within the parameters of section 4502.

Nothing in the plain language of section 4502 requires that the conveyance be undertaken by officials of the penal institution. Section 4502 also covers situations where the prisoner is in the custody of penal officials. Reading section 4502 to require all conveyances to be by penal officials would merge the conveyance requirement with the custody requirement, and there would be no need to have a separate conveyance requirement.

We find appellant's comparison of the Sheriff's Department to the National Football League inapposite. If we were attempting a football analogy, we would compare the Sheriff's Department to an individual team within the NFL, not the NFL itself. Football teams can be roughly divided into offensive and defensive players. In the case of the Sheriff's Department, the offense would be the deputy sheriffs who are peace officers, while the defense would be the custodial officers. (See §§ 830, 830.1, 831, 831.5.) As the testimony of Deputy Harkless and Deputy Servin show, these custodial officers rotate around within the jail system. Deputy Servin was assigned to the North County Correctional Facility, then the Foltz courthouse. Harkless was assigned to the North County Correctional Facility, then the Twin Towers jail, then the Foltz courthouse. At the courthouse, he worked first as a courtroom bailiff, then full-time in lock up services.

2. Consolidation

Appellant contends that the consolidation of his assault on a peace officer charge with his custodial possession of a weapon charge was not authorized by section 954. He also contends that, assuming consolidation was authorized, the trial court abused its discretion in not ordering separate trials because the assault charge was relatively weak, the possession charge was relatively strong and consolidation of the two charges prejudiced him and was a denial of his constitutional rights to a fair trial and due process. We see no error, no prejudice to appellant and no denial of his constitutional rights.

The law prefers consolidation of charges. (*People* v. *Ochoa* (1998) 19 Cal.4th 353, 409.) Section 954 provides that an information may charge "two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated." Section 954.1 provides: "where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other

offense or offenses before the jointly charged offenses may be tried together before the same trier of fact."

"[A] conclusion as to whether two or more offenses are properly joined under Penal Code section 954 is examined independently as the resolution of a pure question of law - whether the offenses are 'different statements of the same offense' or are 'of the same class of . . . offenses' (Pen. Code, § 954) - or the resolution of a predominantly legal mixed fact-law question - whether the offenses were 'connected . . . in their commission' [citation]." (*People* v. *Alvarez* (1996) 14 Cal.4th 155, 188.)

Here, the trial court consolidated the two sets of charges, finding: "In this particular case, this type of conduct – the class of crime is very similar. In fact it's almost the exact same type of crime. Basically, it's assaulting law enforcement."

It is questionable whether, as a matter of law, possession of a weapon is the same class of offense as assault. An assault requires at least the intent to commit a battery. A defendant may possess a weapon because he intends to commit a battery against another, but the defendant may also possess the weapon for purely defensive purposes.[2] Thus, possession of a weapon does not by its nature involve assaultive conduct.

Section 954 also permits joinder if offenses are connected together in their commission, however. The intent or motivation with which different offenses are committed can qualify as a common element of substantial importance in their commission and establish that such crimes were connected together in their commission. (*Alcala* v. *Superior Court* (2008) 43 Cal.4th 1205, 1219-1220 [intent or motivation "to brutally kill young females" tied all offenses together]; *People* v. *Mendoza* (2000) 24 Cal.4th 130, 160 [intent to feloniously obtain property connected the various offenses].)

Here, appellant's assault was made against a peace officer who was executing his duties. The weapon possession charge was coupled with a criminal threats charge, and the prosecutor's theory was that appellant possessed the weapon to use against the bailiff

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[2] No intent to use the weapon is required for the possession charge.

he threatened.[3] It was reasonable to infer that appellant's motivation in both offenses was to assault law enforcement personnel with a deadly or dangerous weapon. Thus, the courthouse offenses and the assault shared a common element of substantial importance and were connected together in their commission. Thus, joinder was permissible.

Even when the statutory requirements for joinder are met, the trial court may still abuse its discretion in not ordering separate trials if a clear showing of prejudice is made. (*People* v. *Walker* (1988) 47 Cal.3d 605, 622.) Appellant contends that was the case here. We see no abuse of discretion.

The burden is on the defendant to show prejudice. (*People* v. *Bean* (1988) 46 Cal.3d 919, 938-939.) "'The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever.'" (*People* v. *Kraft* (2000) 23 Cal.4th 978, 1030.) "Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; [or] (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges . . . . [Citation.]" (*People* v. *Gutierrez* (2002) 28 Cal.4th 1083, 1120.) Extreme disparity between crimes is generally required in order to demonstrate possible prejudice, however. (*People* v. *Mason* (1991) 52 Cal.3d 909, 934.)

Here, there was no cross-admissibility of evidence. "Although cross-admissibility ordinarily dispels any inference of prejudice [citation], the absence of cross-admissibility

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[3] The jury ultimately acquitted appellant on the criminal threats charge.

does not by itself demonstrate prejudice. [Citation.]" (*People* v. *Mendoza* (2000) 24 Cal.4th 130, 161.)[4]

The remaining factors do not show prejudice either. One charge was not more inflammatory than the other. Although firing a gun is potentially more dangerous than possessing a shank, no one was hurt in the gun incident. The cases were equal in strength. Both depended almost entirely on the testimony of law enforcement personnel. Nothing in the record suggests that any one law enforcement witness was more credible than another.

We do not agree with appellant that the assault case was necessarily a much weaker case and he was necessarily prejudiced by consolidation because the jury deadlocked 11 to 1 in favor of acquittal on the assault charge when it was tried alone. There could be many variables which changed between the two trials. There is nothing in the record of this trial to suggest that the assault charge was weaker than the weapon charge. Further, the jury acquitted appellant of the criminal threats charge, which was closely connected to the weapon charge, thus showing that there was no spill-over effect from the weapon charge.

3. CALCRIM No. 2760

Appellant contends that a trial court has a sua sponte duty to instruct the jury on what lawful performance means when it is an issue of sufficient dispute. He contends that under the facts of this case, the trial court erred in failing to give an instruction defining the lawful performance of a detention and arrest. We see no error.

We agree with appellant that a peace officer's lawful performance of his duties is an element of both assault with a firearm on a peace officer and assault on a peace officer. The trial court so instructed the jury.

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[4] Section 954.1 prohibits the courts from refusing joinder strictly on the basis of lack of cross-admissibility of evidence. (*Belton* v. *Superior Court* (1993) 19 Cal.App.4th 1279, 1285.)

We will assume for the sake of argument that a trial court has a sua sponte duty to give an instruction explaining what constitutes lawful performance of duties if that is an issue in dispute at the trial. We see no such dispute in this case.

Appellant did not argue in the trial court that the officers were not performing their lawful duties when they chased him. In fact, he stated that the officers did not detain him. Appellant's defense was that he threw away the gun and it accidentally discharged. Thus, the trial court did not err in failing to instruct the jury on the requirements for a lawful detention or arrest.

On appeal, appellant contends that he was detained when Officer Kinchla got out of the patrol car intending to execute a detention and that a jury could have found that there was no reason to suspect him of criminal activity at that time, making the detention unlawful. Appellant did not make such an argument in the trial court, and the facts would not have supported such an argument. The mere fact that the patrol car slowed down and Officer Kinchla got out of it near appellant did not constitute a detention.

When appellant saw Officer Kinchla, he began to run. Appellant was holding a jacket in an unusual fashion over his arm. As he ran, the jacket dropped, and the officers saw a gun in appellant's right hand. At that point, the officers were certainly justified in detaining appellant for further questioning. Any reasonable peace officer would suspect criminal activity when an armed suspect who matched the general description of a wanted shooting suspect fled upon seeing the peace officer and his partner. Thus, the officers' pursuit of appellant did not create a dispute about the lawfulness of the officers' performance of their duties which required a jury instruction.

4. Evidence that appellant was the suspect in a prior shooting

Appellant was charged with attempted murder for firing the shot which ended up in the backpack. He was acquitted of this charge in his first trial. Appellant contends evidence of the shooting was not relevant in this trial and was prejudicial. He concludes that the trial court abused its discretion in denying his motion to exclude that evidence. We see no abuse of discretion.

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court has broad discretion to weigh the probative value of evidence against its potential prejudicial impact. A court's decision that the probative value of the evidence outweighs its prejudicial impact will not be disturbed on appeal unless the court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Appellant acknowledges that evidence that he was a suspect in a crime was relevant to explain his encounter with Officers Kinchla and Quiroz, but contends that the details of the crime were not relevant.

The fact that the suspected crime was a shooting was also relevant to explain the encounter, particularly in light of appellant's claim that the officers overreacted. It meant that the officers had reason to believe that appellant was armed and had committed a fairly serious crime. It explained their immediate pursuit of him, and their quick response to the sight of a gun in his hand.

We see no prejudice to appellant from the admission of the evidence. The "prejudice" referred to in Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias against one side, with very little effect on the issues. (*People* v. *Crittenden* (1994) 9 Cal.4th 83, 134.)

Testimony from the officer who investigated the backpack shooting showed that the shot did not hurt anyone, but only resulted in a tear in a backpack. As far as the jury could tell, appellant was not charged in that shooting. There was nothing to evoke an emotional bias against appellant.

Since the evidence had some probative value and little to no prejudicial value, the trial court did not abuse its discretion in admitting the evidence.

5. Sentence enhancements

Appellant contends that the trial court erred in imposing both a five-year enhancement pursuant to section 667, subdivision (a)(1) and a one-year enhancement pursuant to section 667.5, subdivision (b) based on the same prior conviction. Respondent agrees. We agree as well.

The same prior robbery conviction was alleged and admitted for both enhancement allegations. Under such circumstances, only the five-year enhancement pursuant to section 667, subdivision (a)(1) can be imposed. (See *People* v. *Jones* (1993) 5 Cal.4th 1142, 1149-1150; *People* v. *Garcia* (2008) 167 Cal.App.4th 1550, 1562.) The section 667.5 enhancement must be stricken.

Disposition

The one-year enhancement imposed pursuant to section 667.5, subdivision (b) is ordered stricken. Appellant's sentence is recalculated to be 32 years. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these changes and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.